88-1886

No. ____

FILED
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JOSEPH F. SPANIOL, JR.
CLERK

In the

Supreme Court of the United States

October Term, 1988

Johnnie Gilbert, et. al.,
Petitioners.

V.

City of Little Rock, et. al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

VOLUME I

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QUESTIONS PRESENTED

I. Whether the U.S. Supreme Court decision in the case of *Crawford* precludes the award of expert witness expense in a Title VII or Civil Rights case under the Civil Rights Attorneys Fee Awards Act of 1976 (§1988).

II. Whether the ruling of the Eighth Circuit Court of Appeals that expert witness fees are not recoverable in a race discrimination case is in conflict with the decisions of other circuits and whether it is in conflict with decisions within the Eighth Circuit itself.

III. Whether the issue of expert witness fees is an important question of federal law which has not been but should be settled by the Supreme Court.

PARTIES INVOLVED

The parties involved in this petition are: Johnnie Gilbert, deceased; Horace Walters; Andrew Lockhart; Billy O'Donald; Julius Bryant; Jack Matlock; Maxie Alexander; Jessie Briscoe; Grady Anthony; Marcella Wilson; Larry Bazzelle, as Petitioners, and the City of Little Rock, Arkansas; the Civil Service Commission of the City of Little Rock, Arkansas; Walter E. "Sonny" Simpson; Carlton E. McMullin; Mahlon Martin and Susan Fleming, as Respondents.

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VOLUME I

Petitioners, Johnnie Gilbert, et. al., respectfully pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on the 27th day of January, 1989.

OPINIONS BELOW

The opinion of the en banc Panel of the Court of Appeals issued on January 27, 1989, is set forth in Appendix A.

The Third Opinion of the Court of Appeals issued on January 27, 1989, is set forth in Appendix B.

The Fourth Opinion of the District Court issued on the 2nd day of August, 1988, is set forth in Appendix C.

The Third Opinion of the District Court issued on the 4th day of August, 1987, is set forth in Appendix D.

JURISDICTION

The Judgment of the en banc Court of Appeal for the Eighth Circuit, as well as the Panel of the Court of Appeals for the Eighth Circuit was decided and entered on the 27th day of January, 1989. The Petitioners requested an additional 30 days to file this Petition. This request was granted and Petitioners have been allowed to file their Petition on or before the 26th day of May, 1989. This Petition of Certiorari was filed within this time period. This Court's jurisdiction is invoked under 28 USC §1254(1).

STATUTES, RULES AND ORDINANCES INVOLVED

Civil Rights Attorney's Fees Awards Act of 1976, 42 USC §1988 (1976):

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, . . . , or Title VI of the Civil Rights Act of 1964 (42 USC 2000d, *et seq.*)
>
> The Court, in its discretion may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of costs.

Civil Rights Act of 1964, §706 (k) as amended, 42 USC §2000 e-5 (k):

> In any action or proceeding under . . . (Title VII) the court, in its discretion, may allow the prevailing party . . . , a reasonable attorney's fee as part of the costs, ...

STATEMENT OF THE CASE

This case comes before this Court as a lawsuit filed by 12 black police officers from the Little Rock Police Department (LRPD). When initially filed in 1978, there were 14 black officers who worked for LRPD. At that time, only two blacks had ever been promoted within the LRPD promotion system—Grady Anthony and Clarence Hunter. Sergeant Anthony was a plaintiff in this case, and Clarence Hunter, who retired before the 1982 trial, testified on behalf of the plaintiffs.

At the first trial, the district court found that there was a prima facie case of disparate impact and disparate treatment; however, it ruled against the plaintiffs on the basis that the prima facie cases were rebutted by defendant's proof. On appeal, the 8th Circuit reversed and remanded, ordering the promotion system to be examined under close scrutiny. Particular emphasis was to be placed upon the blacks who had scored high on the written promotion exam yet low on the oral interview. Certiorari was denied, and a second trial was conducted in 1985. At that trial, the district court found that there was no discrimination, and again it ruled against the plaintiffs.

In a second appeal, the 8th Circuit ruled that the oral interview portion of the LRPD promotion system was discriminatory (lacking standards) and that it was being conducted in large part by white supervisors. Subsequently, a reconsideation for an en banc hearing was denied, and the corrective measures ordered by the 8th Circuit were implemented.

The plaintiffs filed a petition for fees and expenses and accepted the attorney's fees which were awarded. However, plaintiffs' expert witness expenses were drastically reduced by the district court from $93,000 to $900. This reduction was prompted by this Court's ruling in *Crawford Fitting v. J.T. Gibbons, Inc.*, 107 S.Ct. 2494, 96

L.Ed.2d 385 (June 15, 1987). Significantly, the district court ruled that in the absence of *Crawford*, it was inclined to award the "lion's share of the plaintiff's expert witness expense," but because of its interpretation of *Crawford*, it no longer possessed the authority to make such an award. (District Court opinion dated August 4, 1987, attached as Appendix D.)

An appeal was taken to the 8th Circuit Court of Appeals; ultimately, an en banc split decision (5/5) was reached, which disallowed the expert witness expense.

ISSUES

This case, if upheld on appeal, will result in the destruction of the law's intent under the Civil Rights Attorney's Fee Awards Act of 1976 (§1988). Due to disagreement among the various circuits, plaintiffs seek a Writ of Certiorari in order to resolve an important issue of civil rights laws.

I. DOES THE UNITED STATES SUPREME COURT DECISION IN *CRAWFORD* PRECLUDE THE AWARD OF EXPERT WITNESS EXPENSE IN A TITLE VII OR, A CIVIL RIGHTS CASE INVOLVING THE CIVIL RIGHTS ATTORNEY'S FEE AWARDS ACT?

In the Civil Rights Attorney's Fee Awards Act of 1976, Congress earmarked civil rights for special treatment under the law. In fact, the legislative history of §1988 reveals that two of the cases which Congress cited as the standards for interpreting the Act involve expert witness expenses.

A. THE CASE OF *CRAWFORD* DOES NOT PRECLUDE THE PREVAILING PLAINTIFF OF A TITLE VII CASE OR A CIVIL RIGHTS CASE FROM AN AWARD OF EXPERT WITNESS EXPENSE UNDER §1988.

Plaintiffs submit that the district court erred in holding that *Crawford* precludes expert witness expense under §1988. Although the Supreme Court has construed 54(d) as not granting the authority to go beyond the $30 a day limits of §1920 and §1821, the Attorney's Fee Award Act 42 USC (§1988) has not been so interpreted. Likewise, Title VII 42 USC §2000 e-5(k) has not been interpreted to place limits on expert witness expense. In enacting §1988, Congress did not try to narrow the

definition of costs, rather it left it open to be expanded on a case by case basis. After the court identifies a §1988 case, which explicitly authorizes "reasonable attorney's fees as part of costs," 54(d) is not applicable, and the award of attorney's fees in an appropriate case should include expert witness expense.

The *Crawford* decision states "without plain evidence of Congressional intent" to supercede §1821, 1920, and §54(d), the court should not exceed the limitations therein. Therefore, the *Crawford* decision does not preclude awarding expert witness expense in a situation where Congress' intent to allow expert witness expense is clear.

B. THE CONCURRING OPINION IN *CRAWFORD* SPECIFICALLY EXCLUDES §1988 FROM THE RULING.

Justice Blackmon in his concurring opinion points out that §1988 is not at issue in *Crawford* and that it should not be construed as being controlled by the decision *Crawford*, Supra. Apparently, either Justice Blackmon is saying that §1988 carries explicit authorization for expert witness expense or that the specific area of civil rights is excluded from this particular ruling. Significantly, the majority opinion did not controvert or deny Justice Blackmon's position in this matter.

II. THERE IS A CONFLICT WITHIN THE EIGHTH CIRCUIT AND THE OTHER VARIOUS COURTS OF APPEAL.

For over 15 years, the courts have historically embodied within their decisions the principle that expert witness fees are to be allowed and awarded in a §1988 case or civil rights case. Under §1988, Congress used the explicit statutory language of "reasonable attorney's fees as part of costs" because it was selecting the civil rights costs for different treatment under the law. The dissent in the 5th Circuit case giving rise to *Crawford*, *supra*, and

International Woodworkers of America v. Champion, 790 F.2d 1174 (5th Cir. 1986), pointed out that "circuit courts from every circuit in cases arising under §1988 have allowed the prevailing party to recover expert witness fees or other expenses of litigation not enumerated in §1920, either as costs or part of attorney's fees." In the case of *Dowdell v. City of Apopka, Fl.*, 698 F.2d 1181, 1188-92 (11th Cir. 1983), the 11th Circuit rejected any interpretation of reasonable costs which would penalize attorneys for undertaking civil rights litigation, stating "No one expects a policeman or office holder to pay for the privilege of enforcing the law" 122 Cong. Rec. 1,313 (1976) (remarks of Tunney).

In a post *Crawford* decision, the District Court of Pennsylvania ruled that *Crawford* does not apply to fees sought under §1988, because Congress "broadened attorney's fee awards through its enactment of §1988 and had not otherwise retracted, repealed, or modified the limitations on taxable fees . . . " *Black Grievance Committee v. Philadelphia Electric Company*, 47 FEP 215 (E.D. Penn. 1988). The *Grievance* court interpreted Congress to mean that the limitations of §1821 were repealed for purposes of §1988, and it cited Justice Blackmon's opinion for support.

In another post *Crawford* case, *U.S. Yonkers Bd. of Ed.*, 118 FRD 326 (S.D.N.Y. 1987), the Court, citing *Crawford* noted the crippling effect of limiting expert witness fees in §1988 cases. It stated that reimbursement for expert witness fees in suits of this nature is not unusual. Further, in light of the Congressional policy of encouraging the assertion of legal rights in civil matters and the adverse impact limitation on expert witnesses, it concluded that expert witness expense should not have a ceiling or limitation upon the fees.

Contrastingly, in some Circuit Court decisions since *Crawford*, there have been differing results on awarding expert witness expense. In the following cases expert witness expense has been limited:

1. *Chapparel v. Monsanto*, 849 F.2d 1286 (10th Cir. 1988);
2. *ECOS, Inc. v. Brenigar*, 671 F. Supp. 381, 404 n.12 (M.D.N.C. 1987);
3. *Dominic v. Hess Oil*, 841 F.2d 513, 517 (3rd Cir. 1988);
4. *Boring v. Kozakicwikz*, 833 F.2d 468, 474 (3d Cir. 1987);
5. *Sevigny v. Dicksey*, 846 F.2d 953 (4th Cir. 1988).

Significantly, in the above cited cases, Title VII and §1988 issues are not specifically involved. Instead, these cases involve products liability, tort issues, stock fraud, medical treatment for pre-trial detainee, and the Equal Pay Act.

Further conflict on this issue is shown, in the 8th Circuit case of *SapaNajin v. Gunther*, 857 F.2d 463 (8th Cir. 1988) where an award of expert witness expense beyond the limitations imposed in the *Crawford* decision was allowed. This decision stands squarely in opposition to the 8th Circuit case now before this Court on petition for certiorari where expert witness expense was not allowed. Therefore, in addition to conflicting views from other Circuit Courts, a conflict of decisions within the 8th Circuit also exists.

III. THE ISSUE OF EXPERT WITNESS EXPENSE IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THE SUPREME COURT

Congress, in an attempt to protect the civil rights of injured parties, provided that the prevailing party should recover "reasonable attorney's fees as part of costs" (§1988). In the Congressional Record, testimonies from several witnesses specifically address the issue of expert witness expense and identify it as an area of concern. Specifically, Senator Tunney, stated that he wanted to make sure that attorneys recover their necessary and incidential expenses related to litigation. Sen. Rep. No. 1011, 94th Cong. 2d Sess. 2 (1976). Additionally, Congressman Drennan stated in the

Congressional Record that the term "reasonable attorney's fees" should include "incidential and necessary expense" 122 Cong. Rec. 35, 123.

The exact method of calculating the attorney's fees was not provided in §1988. However, it is agreed that Congress authorized reasonable attorney's fees. Significantly, if expert witness fees are not recoverable, then the attorney's fees would be reduced by that amount; often this would not be reasonable, thus Congress' stated purpose would be thwarted.

Congress specifically chose a phrase with significance in civil rights litigation: "reasonable attorney's fees as part of costs." It carefully chose these words to accomplish its objectives and purposes, because this phrase had already been interpreted by the courts in civil rights law. Therefore, Congress' desire was to follow the precedent already established in civil rights litigation, and it brought forward into §1988 the prior judicial standards for interpreting attorney's fees as part of costs. This Court in the case of *Blum v. Stevenson*, 465 U.S. 86, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984) previously recognized this, stating "Congress directed that attorney's fees be calculated according to standards currently in use under other fee shifting statutes." Additionally, the Congressional Record itself makes the following statement:

> It is intended that the amount of fees awarded under §1988 be governed by the same standards which prevailed in other types of equally complex federal litigation, such as anti-trust cases, and not be reduced because the rights involved may be non-pecuniary in nature. The appropriate standards, see *Johnson v. Georgia Highway Express* . . . are correctly applied in such cases as *Stanford v. Gurcher*, 65 FRD 680 . . . *Davis v. County of Los Angeles*, 8 EPD §9444 . . . and *Swan v. Charlotte Mecklenburg Bd. of Ed.*, 66 FRD 483 . . . these cases have resulted in fees which are adequate to

> attract competent counsel but which do not produce windfall to attorneys.
>
> S. Rep. No. 1011, 94th Cong. 2d Sess. 6 (1976).

As the above quote shows, Congress stated its intent to bring judicial interpretation of reasonable attorney's fees as part of costs into the Fee Awards Act. Significantly, two of the three cases which Congress recommended for interpreting this legislation granted expert witness expense. In fact, in *Davis, supra* at 5048, the Court specifically makes the statement in reference to expert witness fees: "These charges have not been challenged by defendants and are valid."

Congress was concerned about the ultimate destruction of the intent of critical civil rights legislation; therefore, its expressed purpose was to vindicate civil rights. Congress, in recognizing a need for protection of civil rights and a need for equal justice to all citizens, provided equal access to the courts. Sen. Rep. No. 94-1011, 94th Cong., 2d Sess., p. 3 (1976). Congress also recognized that in addition to equal access to the courts, there must be effective enforcement of civil rights laws and that in order to do this, there must be effective counsel. In order for Congress to provide equal access to the courts and effective enforcement of the civil rights laws, a "standard" had to be provided. Therefore, Congress accomplished this objective by bringing forth prior case law and by giving courts the discretion to interpret the attorney's fee statute:

> . . . Congress has passed many statutes requiring that fees be awarded to a prevailing party. Again the committee adopted a more moderate approach here by leaving the matter to the discretion of the judge, guided of course, by the case law interpreting similar attorney's fee provisions.
>
> H.R. Rep. 1558, 94th Cong. 2d Sess., 8 (1976)

Because the civil rights legislation passed by Congress since 1964 is dependent on equal access to the courts for enforcement, this case involves an important question of Federal law. The Civil Rights Attorney's Fee Awards Act of 1976 provides for equal access to the courts by allowing fees as part of costs to the prevailing party. Petitioners appeal to this Court for its assistance in interpreting this law. Regardless of the outcome of this litigation, determination by the U.S. Supreme Court is necessary in order to resolve these important issues for all people seeking to vindicate civil rights. This issue of expert witness expense in a civil rights case is an important question yet to be settled by this Court and this is the appropriate case for resolution.

CONCLUSION

Petitioners assert that it is proper at this time for this Court to consider the matter of expert witness expense in the civil rights case of *Gilbert*. The focus of this case now coming on before this Court involves the interaction of §1988 and FRCP §54(d), involving expert witness expense. There are no other issues involved on appeal in this case, and the trial court has previously ruled that the requested expert witness expense is reasonable by stating that "the lion's share" of the expense would be awarded absent *Crawford*. With this in mind, petitioners assert that the reasons for granting certiorari exist in this case including a conflict within the Eighth Circuit Court of Appeals itself. For these and the other reasons stated above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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VOLUME II
APPENDIX

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APPENDIX A

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 87-2128
No. 87-2189

Johnnie Gilbert, Horace Walters, Andrew Lockhart, and Billy O'Donald,	*	
Appellants/Cross-appellees,	*	
v.	*	
The City of Little Rock, Arkansas; The Civil Service Commission of the City of Little Rock, Arkansas; Walter E. "Sonny" Simpson, individually and in his official capacity as Chief of Police of the City of Little Rock, Arkansas; and Carlton E. McMullin, individually and in his official capacity as City Manager of the City of Little Rock, Arkansas,	*	Appeals from United States District Court for the Eastern District of Arkansas
Appellees/Cross-appellants.	*	
Julius Bryant, Jack Matlock, Mixie Alexander, Jesse Briscoe, Grady Anthony, Marcella Wilson, and Larry Bazzelle,	*	
Intervenors-Below.	*	

Submitted: December 8, 1988

Filed: January 27, 1989

Before LAY, Chief Judge, HEANEY,* McMILLIAN, ARNOLD, JOHN R. GIBSON, FAGG, BOWMAN, WOLLMAN, MAGILL, and BEAM, Circuit Judges, *en banc.*

PER CURIAM.

The order of the district court [1] awarding appellants expert witness fees as expenses under 42 U.S.C. § 1988 at the statutory rate of $30 per day, 28 U.S.C. § 1821, for a total award of $900.00, [2] is affirmed by the vote of an equally divided court.

The remaining issues are remanded to the original panel for decision.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

*The HONORABLE GERALD W. HEANEY assumed senior status on January 1, 1989.

1 The Honorable Elsijane T. Roy, United States District Judge for the Eastern District of Arkansas.

2 *Gilbert v. City of Little Rock*, No. LR-C-78-340, slip op. at 9-10 (E.D. Ark. Aug. 7, 1987) (order), *citing Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 107 S.Ct. 2494 (1987).

APPENDIX B

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 87-2128
No. 87-2189

Johnnie Gilbert, Horace Walters, Andrew Lockhart, and Billy O'Donald,	*	
Appellants/Cross-appellees,	*	
v.	*	
The City of Little Rock, Arkansas; The Civil Service Commission of the City of Little Rock, Arkansas; Walter E. "Sonny" Simpson, individually and in his official capacity as Chief of Police of the City of Little Rock, Arkansas; and Carlton E. McMullin, individually and in his official capacity as City Manager of the City of Little Rock, Arkansas,	*	Appeals from United States District Court for the Eastern District of Arkansas
Appellees/Cross-appellants.	*	
Julius Bryant, Jack Matlock, Mixie Alexander, Jesse Briscoe, Grady Anthony, Marcella Wilson, and Larry Bazzelle,	*	
Intervenors-Below.	*	

Submitted: December 8, 1988

Filed: January 27, 1989

Before McMILLIAN, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and HANSON,* Senior District Judge.

McMILLIAN, Circuit Judge.

The court en banc has remanded the non-expert witness fees issues raised in these appeals to the original panel for decision.

In appeal No. 87-2128, Johnnie Gilbert, Horace Walters, Andrew Lockhart, and Billy O'Donald (appellants) appeal from a final order entered in the District Court [1] for the Eastern District of Arkansas limiting appellant Walters's recovery of backpay to $331.73. *Gilbert v. City of Little Rock*, No. LR-C-78-340 (E.D. Ark. Aug. 4, 1987) (order). For reversal, appellants argue the district court erred in refusing to award Walters backpay on the basis of the salary of a lieutenant. In appeal No. 87-2189, the City of Little Rock (the City) cross-appeals from the district court's order awarding appellants $184,969.50 in attorney's fees. For reversal, the City argues that the district court erred in (1) refusing to further reduce the number of compensable hours, (2) refusing to further reduce the award of attorney's fees for failure to completely prevail, and (3) enhancing the award of attorney's fees.

*The Honorable William C. Hanson, United States Senior District Judge for the Northern and Southern Districts of Iowa, sitting by designation.

1 The Honorable Elsijane T. Roy, United States District Judge for the Eastern District of Arkansas.

For the reasons set forth below, we affirm the order of the district court, as modified herein.

BACKGROUND

On September 27, 1978, appellants filed a complaint in district court against the City and others alleging racial discrimination by the City of Little Rock Police Department (LRPD), in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f), 42 U.S.C. §§ 1981, 1983, and the fourteenth amendment. Other parties subsequently intervened as plaintiffs. Appellants and intervenors charged LRPD with racial harassment, discriminatory disciplinary policies, and discriminatory promotional policies, and sought injunctive relief and compensatory and punitive damages. The district court found neither intentional discrimination nor disparate impact and dismissed the complaint. *Gilbert v. City of Little Rock*, 544 F. Supp. 1231, 1261 (E.D. Ark. 1982). On appeal, this court affirmed the dismissal of the racial harassment and discriminatory discipline claims but remanded the discriminatory promotions claim. *Gilbert v. City of Little Rock*, 722 F.2d 1390 (8th Cir. 1983), *cert. denied*, 466 U.S. 972 (1984). The district court on remand again dismissed the discriminatory promotions claim. *Gilbert v. City of Little Rock*, No. LR-C-78-340 (E.D. Ark. June 7, 1985).

On appeal after remand, this court reversed, finding that appellants had been discriminated against on the basis of their race through the LRPD promotional system, and remanded to the district court to determine the compensation to be awarded. *Gilbert v. City of Little Rock*, 799 F.2d 1210 (8th Cir. 1986). We instructed that appellants should be permanently promoted to sergeant as soon as positions are available and should be compensated for lost wages and benefits from the date they would have been promoted absent discrimination until they actually were promoted. *Id.* at 1216. We also noted that appellants could apply to the district court for attorney's fees. *Id.*

On remand, the parties stipulated the amounts of compensation appellants Gilbert, O'Donald, and Lockhart should receive. The parties were unable to agree on the proper compensation for appellant Walters. Walters was actually promoted to sergeant in September 1980, not long after July 1980, the date he would have been promoted absent discrimination. Walters was further promoted to lieutenant in October 1983. The City believed that Walters should be awarded backpay for the period between July 1980, when he would have been promoted to sergeant absent discrimination, and September 1980, when he actually was promoted. Walters maintained that, but for the discrimination, he would have been promoted to *lieutenant* in October 1981, rather than October 1983, and accordingly should be awarded backpay on that basis. The district court ruled in favor of the City because it found to be speculative Walters's claim that he would have been promoted to lieutenant earlier. Slip op. at 2-3.

The district court also ruled on appellants' request for attorney's fees and costs pursuant to the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988. Three of appellants' attorneys requested an award of attorney's fees: Thomas M. Bramhall, Ralph C. Ohm, and Phillip J. Duncan. Bramhall requested compensation for 153.75 hours at the rate of $125.00 per hour. The City conceded the reasonableness of Bramhall's hours, but challenged the $125.00 hourly rate as excessive. The district court granted Bramhall compensation at the rate of $110.00 per hour and awarded him attorney's fees in the amount of $16,912.50. Slip op. at 5-6.

Ohm sought compensation for 354.94 hours at the rate of $65.00 per hour for his work as an attorney and 239.50 hours at $25.00 per hour for his work as a law clerk. The district court reduced Ohm's attorney hours to 300 and reduced his overall attorney's fee by fifteen percent due to the failure of appellants to completely prevail. *Id.* at 6. The

district court also enhanced Ohm's fee by fifteen percent because of "the undesirability of this case, the difficulty of the questions presented, the time and labor required, the length of the professional relationship with [appellants,] and the contingent nature of the fee," *id.*, and awarded Ohm $25,048.75 in attorney's fees. *Id.* at 7.

Duncan requested compensation for 1,662.69 hours at the rate of $125.00 per hour. The district court reduced the number of compensable hours to 1,330 and determined that a reasonable hourly rate was $110.00. *Id.* at 7-8. The district court then reduced and enhanced Duncan's award, as it had previously done with Ohm's fee, and awarded Duncan $143,008.25 in attorney's fees. *Id.* at 8.

As to costs, the district court awarded appellants $3,302.35 for transcript and deposition costs and $3,960.24 for out-of-pocket expenses. *Id.*

Appellants also claimed $93,946.69 in expert witness fees and expenses. The district court noted that "[u]ntil recently, the Court would have been inclined to award [appellants] the lion's share of the expert witness fees requested," *id.* at 9-10, but felt constrained by *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 107 S.Ct. 2494 (1987) (*Crawford Fitting*), to limit the recovery of expert witness expenses to thirty dollars per day. Slip op. at 13. Accordingly, the district court limited its award of expert witness fees to $900.00. *Id.*

A panel of this court affirmed the district court's order as modified and remanded with directions. Appellants' petition for rehearing en banc was granted, thus vacating the panel opinion, because the analysis of the expert witness fees issue was in conflict with *SapaNajin v. Gunter*, 857 F.2d 463 (8th Cir. 1988). The order of the district court awarding appellants expert witness fees as expenses under 42 U.S.C. § 1988 at the statutory rate of $30 per day, 28 U.S.C. § 1821, was affirmed by the vote of an equally divided

court. The remaining issues were remanded to the original panel for decision.

BACKPAY

Appellant Walters argues that the district court erred in refusing to award him backpay calculated with reference to the salary of a lieutenant rather than a sergeant. Absent discrimination, Walters would have been promoted to sergeant in July 1980. Because of this court's determination in *Gilbert v. City of Little Rock*, 799 F.2d 1210, that Walters had been denied promotion on the basis of racial discrimination, he was promoted to "acting" sergeant in September 1980. Walters was paid the salary of a permanent sergeant, [2] but, as an "acting" sergeant, he was ineligible to be considered for promotion to lieutenant. To be eligible for promotion to lieutenant, an officer must have served as a "permanent" sergeant for one year. Walters was promoted to permanent sergeant in 1982 and to lieutenant one year later in October 1983. Walters now argues that he should be awarded backpay at the salary of a lieutenant because, absent discrimination, he would have been promoted to permanent sergeant in 1980, and further promoted to lieutenant in 1981, rather than 1983.

The purpose of backpay is to "mak[e] persons whole for injuries suffered through past discrimination." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975) (footnote omitted). Backpay is available to remedy discrimination in a promotional system, however, only where the employee would have been promoted absent discrimination. Because backpay is an equitable remedy, there must be some certainty that the promotion would have occurred absent the discrimination. That degree of certainty is absent in the case of appellant Walters. Although he would have been

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2 The district court awarded Walters $331.73 in backpay to compensate him for the period from July to September 1980 that he would have been a sergeant absent discrimination.

promoted to permanent sergeant in 1980 absent discrimination, Walters's claim that he would then have been promoted to lieutenant in 1981 is nothing more than conjecture. There is no reason to believe that just because Walters was promoted to lieutenant within a year of becoming a permanent sergeant in 1982, he would similarly have been promoted to lieutenant in 1981 within a year of becoming a permanent sergeant in 1980. An award of backpay cannot be made on such a speculative basis.

Accordingly, we hold the district court did not err in refusing to award Walters backpay on the basis of the salary of a lieutenant.

ATTORNEY'S FEES

The City challenges several aspects of the district court's award of attorney's fees. First, the City argues that the district court should have further reduced the number of compensable hours claimed by Phillip J. Duncan. Duncan requested compensation for 1,662.69 hours, and the district court awarded him compensation for 1,330 hours. The City argues that 1,330 hours is an unreasonable figure.

The number of hours to be awarded to a prevailing party under 42 U.S.C. § 1988 is committed to the discretion of the district court. *Williams v. Trans World Airlines, Inc.*, 660 F.2d 1267, 1274 (8th Cir. 1981). "The trial judge should weigh the hours claimed against his [or her] own knowledge, experience, and expertise of the time required to complete similar activities." *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717 (5th Cir. 1974); *see also Ladies Center, Nebraska, Inc. v. Thone*, 645 F.2d 645, 648 (8th Cir. 1981). At this stage of the proceedings, "[t]he trial judge is in a much better position to make this appraisal than we are." *Jaquette v. Black Hawk County*, 710 F.2d 455, 461 (8th Cir. 1983). The district court has already reduced Duncan's requested compensable hours by 332.69 hours. In view of the complex and extended nature of this litigation, we are

unable to hold that the district court abused its discretion in concluding that Duncan should be compensated for 1,330 hours of his legal work.

The City also challenges the district court's refusal to further reduce the award of attorney's fees due to the failure of appellants to completely prevail in the litigation. The district court reduced the attorney's fee award by fifteen percent because only four of the thirteen original plaintiffs in this cause were granted relief and a number of appellants' claims were found to lack merit. Appellants were successful, however, in prevailing on substantial issues in the case. They demonstrated that the promotional practices of LRPD were racially discriminatory and obtained appropriate relief including backpay. "Where a plaintiff has obtained excellent results, his [or her] attorney should receive a fully compensatory fee . . . . In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit." *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983) (*Hensley*). Furthermore, even where a plaintiff has only partially prevailed on his or her claims, "[a] court should not disallow attorney hours related and necessary to successful claims." *Catlett v. Missouri Highway & Transportation Comm'n*, 828 F.2d 1260, 1270 (8th Cir. 1987), *cert. denied*, 108 S.Ct. 1574 (1988). Appellants did not completely prevail in this litigation, and the district court reduced their award to reflect that partial failure. The district court "necessarily has discretion in making this equitable judgment," *Hensley*, 461 U.S. at 437, and we are unable to conclude that it abused its discretion in reducing the attorney's fee award by fifteen percent.

The district court also enhanced the attorney's fee award by fifteen percent due to (1) the undesirability of this case, (2) the difficulty of the questions presented, (3) the time and labor required, (4) the length of the professional relationship with appellants, and (5) the contingent nature of the fee. The City correctly points out that the first four of

these five factors cannot serve as bases for enhancing an award of attorney's fees because they are already reflected in the initial determination of the reasonable hourly rate and number of compensable hours. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 564-66 (1986) (*Delaware Valley I*); *Blum v. Stenson*, 465 U.S. 886, 898-900 (1984). In *Delaware Valley I*, the Court noted that " '[w]hen . . . the applicant for a fee has carried his [or her] burden of showing that the claimed rate and number of hours are reasonable, the resulting product *is presumed* to be the reasonable fee' to which counsel is entitled." 478 U.S. at 564 (emphasis in original), *citing Blum v. Stenson*, 465 U.S. at 897. The Court also stated that

> the "novelty [and] complexity of the issues," "the special skill and experience of counsel," the "quality of representation," and the "results obtained" from the litigation are presumably fully reflected in the lodestar amount, and thus cannot serve as independent bases for increasing the basic fee award. Although upward adjustments of the lodestar figure are still permissible, such modifications are proper only in certain "rare" and "exceptional" cases, supported by both "specific evidence" on the record and detailed findings by the lower courts.

478 U.S. at 565 (citations omitted), *citing Blum v. Stenson*, 465 U.S. at 898-01. Accordingly, the first four factors enumerated by the district court cannot support its enhancement of the attorney's fee award.

The Court in *Delaware Valley I* left open the question whether the risk of loss could serve as a factor supporting enhancement of an award of attorney's fees. The Court returned to that question in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 107 S.Ct. 3078 (1987) (*Delaware Valley II*). Four justices in *Delaware Valley II* reached the conclusion that risk of loss could not serve as an enhancement factor. *Id.* at 3086-89 (White, J., with whom

Rehnquist, C.J., and Powell and Scalia, JJ., joined). Justice O'Connor concurred with these four justices on the understanding that although risk of loss was not properly applied on the facts before the Court, Congress did not intend to exclude the possibility of enhancing an attorney's fee award because of the risk of loss. *Id.* at 3089-91 (O'Connor, J., concurring in part and concurring in the judgment). This circuit requires an applicant to "demonstrate that enhancement [is] necessary to attract competent local counsel in light of the risk of loss arising from the [applicant's] contingency fee arrangement." *Catlett v. Missouri Highway & Transportation Comm'n*, 828 F.2d at 1271. *See also Delaware Valley II*, 107 S.Ct. at 3091 (O'Connor, J., concurring in part and concurring in the judgment); *Norman v. Housing Authority*, 836 F.2d 1292, 1302 (11th Cir. 1988); *Friends of the Earth v. Eastman Kodak Co.*, 834 F.2d 295, 298 (2d Cir. 1987); *Leroy v. City of Houston*, 831 F.2d 576, 583-84 (5th Cir. 1987), *cert. denied*, 108 S.Ct. 1735 (1988); *Blum v. Witco Chemical Corp.*, 829 F.2d 367, 379-82 (3d Cir. 1987). This is because fee-shifting statutes

> were not designed as a form of economic relief to improve the financial lot of attorneys, nor were they intended to replicate exactly the fee an attorney could earn through a private fee arrangement with his [or her] client. Instead, the aim of such statutes was to enable private parties to obtain legal help in seeking redress for injuries resulting from the actual or threatened violation of specific federal laws.

Delaware Valley I, 478 U.S. at 565.

The district court's original findings did not focus on the necessity of the enhancement in order to attract competent local counsel in light of the risk of loss arising from the contingent nature of the fee. Because the enhancement was therefore unsupported by the district court's findings, we remanded the case to the district court for the limited purpose of making additional factual findings

on this issue while retaining jurisdiction over the appeals. We also instructed the district court to make findings with respect to the extent to which the enhancement was based on the contingent nature of the fee.

After considering affidavits submitted by both parties from lawyers in the local community, the district court found that in the absence of fee enhancement to compensate for the risk of loss arising from the contingency fee arrangement, "[appellants] would have faced substantial difficulty in finding counsel of sufficient competency in this market." *Gilbert v. City of Little Rock*, No. LR-C-78-340, slip op. at 2 (E.D. Ark. Aug. 2, 1988) (order). The district court also clarified that "roughly two-thirds of the enhancement" was attributable to the risk of loss arising from the contingent nature of the fee. *Id.*, at 3. We conclude that the district court's enhancement of Ohm's and Duncan's fee award was proper, but only to reflect enhancement solely for the risk of loss due to the contingent nature of the fee. Reducing the enhancement from fifteen percent to ten percent to reflect the extent to which this factor contributed to the enhancement of the fee, we award Ohm $24,220.00, and Duncan $136,790.50 as attorney's fees.

Accordingly, the order of the district court is affirmed as modified herein.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX C

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

JOHNNIE GILBERT, et al. PLAINTIFFS

V. NO. LR-C-78-340

CITY OF LITTLE ROCK,
ARKANSAS, et al. DEFENDANTS

ORDER

On July 15, 1988, the Eighth Circuit Court of Appeals remanded this cause to this Court "for the limited purpose of making further findings of fact with regard to the enhancement of Mr. Ohm's and Mr. Duncan's attorney's fee award." More specifically, the Eighth Circuit directed this Court to address:

> (1) whether "without an adjustment for risk the prevailing party 'would have faced substantial difficulties in finding counsel in the local or other relevant market,' " (citations omitted), and
>
> (2) the extent to which the court's 15% enhancement is based upon the contingent nature of the fee.

By its Order dated July 18, 1988, this Court directed the parties to file briefs addressing these questions and to notify the Court if a hearing was desired. Although neither side finds a hearing necessary on these points, both sides have submitted briefs and affidavits to the Court. Plaintiffs submitted affidavits from three of their number and five local attorneys, two of whom are plaintiffs' counsel herein. Defendants filed one affidavit from a local attorney.

Initially, the Court notes that in calculating the fees to which plaintiffs' counsel were found to be entitled, the concepts of "risk" and "contingent nature of the fee" were viewed as basically addressing the same concern—that is, if their efforts proved unsuccessful, plaintiffs' counsel might expend many long and difficult hours on the case and not receive any compensation whatsoever for their services. With respect to the queries of the Eighth Circuit, the Court is convinced that a considerable degree of skill and expertise was required of counsel in this difficult case. The affidavits submitted by plaintiffs from three of the leading civil rights attorneys in the State of Arkansas reveal that "risk adjustment" is essential, for a number of economic reasons, to their acceptance of civil rights cases. While plaintiffs may have been able to find some counsel from Little Rock or the surrounding area to represent them in this case even without the possibility of risk adjustment, the Court finds from the affidavits submitted that plaintiffs would have faced substantial difficulty in finding counsel of sufficient competency in this market if such adjustments were barred outright.

The Court's determination that a 15% enhancement of the fees awarded Mr. Ohm and Mr. Duncan was appropriate in this cause was based almost entirely upon the factors of "risk/contingent nature of the fee" and "the undesirability of the case." The Court found the latter to be applicable to this case due to the possibility that plaintiffs' counsel would be stigmatized on account of the nature of the litigation and the parties involved. The other factors cited in the Court's Opinion of August 4, 1987 were of marginal significance, at best, in the Court's calculations. Although the Court did not at the time of the making of the fee awards assign an exact value to the "risk/contingent nature of the fee" factor in arriving at the 15% enhancement, the Court can say that roughly two-thirds of the enhancement was attributable to that factor.

This Order shall be certified to the Eighth Circuit Court of Appeals consistent with its Order of July 15, 1988.

Additionally, the affidavits submitted to the Court by both parties shall be made a part of the record herein.

DATED this 2nd day of August, 1988.

/s/ Elsijane T. Roy
United States District Judge

This document entered on docket sheet in compliance with Rule 58 end/or 79(a) FRCP on 8-3-88 by DC.

APPENDIX D

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

JOHNNIE GILBERT, HORACE WALTERS,
ANDREW LOCKHART and
BILLY O'DONALD PLAINTIFFS

VS. NO. LR-C-78-340

CITY OF LITTLE ROCK, ARKANSAS;
THE CIVIL SERVICE COMMISSION OF
THE CITY OF LITTLE ROCK, ARKANSAS;
WALTER E. "SONNY" SIMPSON, INDIVIDUALLY
AND IN HIS OFFICIAL CAPACITY AS CHIEF
OF POLICE OF THE CITY OF LITTLE ROCK,
ARKANSAS; and CARLTON E. McMULLEN,
INDIVIDUALLY AND IN HIS OFFICIAL
CAPACITY AS CITY MANATER OF THE CITY
OF LITTLE ROCK, ARKANSAS - DEFENDANTS

MEMORANDUM OPINION

Pending before the Court is plaintifffs' Petition for Attorney's Fees and Costs pursuant to 42 U.S.C. §1988, to which defendants have fully responded. Also before the Court is the issue of the amount of back pay to which one plaintiff, Horace Walters, is entitled, the parties having stipulated to the amounts which plaintiffs Johnnie Gilbert, Billy O'Donald, and Andrew Lockhart should receive.

I. *Horace Walters' Back Pay*

On August 28, 1986, the United States Court of Appeals for the Eighth Circuit filed its Opinion in this cause (*Gilbert II*) in which it directed, *inter alia*, that plaintiffs Gilbert, O'Donald, Lockhart, and Walters be given

permanent promotions to sergeant as soon as positions are available, and that they be compensated for lost wages and benefits from the dates they would have been promoted absent discrimination until they actually were promoted. [1] As noted previously, the parties stipulated to the relief to which Gilbert, O'Donald and Lockhart were entitled. From the pleadings recently filed, it appears that the Court need only address the issue of back pay for plaintiff Walters.

Walters was actually promoted to sergeant in 1980, not long after the date the Eighth Circuit found he would have been promoted had he not been discriminated against on account of his race. For that reason, he received a higher salary than Gilbert, O'Donald, and Lockhart during the several years that followed. On account of this, defendants contend that Walters is entitled to less back pay than the others, by their figures $331.73. On the other hand, Walters asserts that he is entitled to $9,324.95. Walters claims that he should have been promoted to lieutenant in October of 1981, rather than October of 1983, the actual date he became a lieutenant, and that he should receive back pay for that deprivation, as well. The disparity between plaintiffs' and defendants' back pay figures primarily stems from their difference of opinion as to when Walters should have been made lieutenant.

Although determined to make Walters whole for the injuries he suffered at the hands of defendants, the Court cannot say with certainty that he would have been promoted to lieutenant in October of 1981 but for the unlawful discrimination. Clearly, the Court cannot award any relief, back pay or otherwise, on such a speculative

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The mandate from the Eighth Circuit was received by this Court on November 10, 1986. After several extensions of time for each side to prepare its pleadings and briefs, this matter became ripe for consideration on May 26, 1987. However, additional briefs were received in response to the United States Supreme Court's decision in *Crawford Fitting Company v. J.T. Gibbons, Inc., infra.*

basis. Accordingly, the Court finds that Horace Walters is entitled to back pay from defendants in the amount of $331.73, representing the salary he was denied by virtue of the delay of his promotion to sergeant. Inasmuch as the other types of relief mandated by the Eighth Circuit have not been addressed by the parties in their pleadings and memoranda, the Court assumes that those matters have been disposed of through stipulation.

II. *Attorney's Fees and Costs*

Defendants concede that, for the purposes of the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. §1988, plaintiffs are "prevailing parties" herein and are entitled to an award of reasonable attorney's fees and costs. That given, this Court need only determine what amount of fees and costs will be "reasonable" under the circumstances of this case, as guided by the pronouncements of the United States Supreme Court and the Eighth Circuit Court of Appeals on the subject.

A. *Attorney's Fees*

"The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart*, 461 U.S 424, 433 (1983); *see also Blum v. Stenson*, 465 U.S. 886 (1984) ("product of reasonable hours times a reasonable rate normally provides a reasonable attorney's fee within the meaning of the statute"). This computation yields what is known as the "lodestar" amount. Although this formula provides a sound basis for computing an estimate of the fee a lawyer should receive in any particular case, it "does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the 'results obtained.'" *Hensley v. Eckerhart, supra*, at 434. Other factors which should be considered in determining the

propriety of fee enhancement or reduction are set out in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) [2].

Plaintiffs, through the affidavits of their counsel, request attorney's fees for the hours reflected below at the claimed hourly rates, as follows:

Attorney	Hours Expended	Hourly Rate	Lodestar Fee
Phillip J. Duncan	1,662.69	$125.00	$207,836.25
Thomas M. Bramhall	153.75	$125.00	19,218.75
Ralph C. Ohm	354.94	$65.00	23,071.10
Ralph C. Ohm (law clerk)	239.50	$25.00	5,987.50
TOTAL			$256,113.60

In addition, plaintiffs have asked the Court to enhance the amount of the requested fees on account of, among other things, the quality of representation, the complexity of the issues, and the risk of receiving no fee at all.

With but a few exceptions, defendants contend that the hours claimed to have been expended and the hourly rate of pay requested by plaintiffs' counsel are unreasonable and excessive. The Court will address the merits of the petition as it relates to each attorney individually.

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Those factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation and abilities of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Id.* at 717-719.

1. Thomas M. Bramhall

Regarding the request for Mr. Bramhall, defendants concede the reasonableness of the 153.75 hours he claims to have expended on this case; however, they challenge the $125.00 hourly rate requested for him. In support of the request, plaintiffs have attached affidavits from several members of the local bar attesting to the considerable ability and experience of Mr. Bramhall as a trial attorney.

Mr. Bramhall devoted approximately four weeks time to preparation and presentation of this case on retrial. Plaintiffs ultimately prevailed on most of the issues litigated during his participation. The Court acknowledges his experience and competence as an attorney. Based upon the arguments of counsel and the affidavits in support thereof, the Court finds that Mr. Bramhall should be compensated at the rate of $110.00 per hour for his services rendered to plaintiffs herein. That figure is consistent with prevailing rates in the Little Rock area for experienced counsel in difficult civil rights cases. Due to his relatively brief involvement in this matter, the Court is of the opinion that no enhancement of Mr. Bramhall's fee is warranted. Nor is any reduction appropriate on account of the success ultimately obtained. Accordingly, an attorney's fee in the amount of $16,912.50 is awarded for Mr. Bramhall.

2. Ralph C. Ohm

Defendants object not only to the number of hours expended by Mr. Ohm, but also to the $65.00 hourly rate requested for his attorney services. The Court finds no merit in most of defendants' contentions with respect to Mr. Ohm's representation. However, the Court agrees that the number of attorney hours claimed should be slightly reduced due to duplication of the efforts of Messrs. Bramhall and Duncan. Mr. Ohm shall be compensated for 300 hours at the rate of $65.00 per hour for his attorney time, as well as for all claimed law clerk time at the rate of

$25.00 per hour. Accordingly, the Court finds that for his efforts on behalf of plaintiff, a reasonable fee for Mr. Ohm is $19,500.00 for services as attorney and $5,987.50 for services as law clerk, or a total lodestar of $25,487.50. The Court further finds that the attorney's fee portion of the lodestar should be adjusted. Reduction of that figure by 15% is warranted due to plaintiffs' failure to completely prevail. Only four of the thirteen original plaintiffs in this cause were granted relief, and a number of plaintiffs' claims were found to lack merit. However, an enhancement of 15% is appropriate on account of the undesirability of this case, the difficulty of the questions presented, the time and labor required, the length of the professional relationship with plaintiffs, and the contingent nature of the fee. Thus, the adjusted attorney's fee award for Mr. Ohm's services is $19,061.25. The total award for his services shall be $25,048.75.

3. Phillip J. Duncan

The major point of contention between the parties with regard to attorney's fees concerns the fee requested for Mr. Duncan—$207,836.25. Defendant contends that both the $125.00 hourly rate requested and the 1,662.69 hours expended are grossly excessive and unreasonable.

After carefully reviewing Mr. Duncan's detailed record of his time expended on this case, the Court feels compelled to agree with defendants that the number of hours claimed is excessive. The time record reflects entries for "research" or "study case law" on well over a hundred days during his work on this case. Although it is indeed reasonable for an attorney to engage in a certain amount of research in preparing a case for trial, the Court finds that it would be inequitable to require defendants to compensate Mr. Duncan for all of his research time. Considering the circumstances of this case and the time and effort required to fully present plaintiffs' claims, the Court finds that the number of hours which Mr. Duncan should have reasonably

expended on this case is 1,330, or roughly 80 per cent of what has been claimed.

Defendants contend that Mr. Duncan should be compensated at the rate of $90.00 per hour, rather than $125.00, as requested, for his professional services rendered herein. Based on the affidavits of other local counsel, as well as the pleadings and memoranda of the parties, the Court finds that a rate of compensation for Mr. Duncan of $110.00 per hour for all time reasonably expended from 1980 to the present is both reasonable and fair. The product of Mr. Duncan's allowed hours times the approved hourly rate yields a lodestar of $146,300.00. Using the reduction and enhancement percentages set out previously with respect to the fee for Mr. Ohm, the Court finds that plaintiffs should be awarded $143,008.25 in attorney's fees for the services of Mr. Duncan. Total attorney's fees (including law clerk compensation) in the amount of $184,969.50 are hereby awarded.

B. *Costs*

Plaintiffs request that they be awarded costs from defendants in the total amount of $103,534.01, consisting of transcript and deposition costs, other out-of-pocket expenses, and expert witness fees. Defendants argue, for a number of reasons, that they should be compelled to pay only a fraction of those costs. The Court will address each element of these costs separately.

1. Transcript and Deposition Costs

Defendants have, "in the interest of fairness," stipulated that plaintiffs should be reimbursed all of the $3,302.35 they have requested for transcript and deposition costs. That sum is hereby awarded to plaintiffs from defendants.

2. Out-of-Pocket Expenses

Plaintiffs seek reimbursement for a miscellany of expenses in the aggregate amount of $6,284.97. Defendants concede the fairness and reasonableness of $3,960.24 of such expenses, but dispute the remainder.

Defendants' primary objection in this area concerns plaintiffs' request for reimbursement of air fare, hotels and meals, printing expenses and express mail costs incurred while this case was before the Eighth Circuit on appeal. After reviewing the cost statement and the arguments of counsel, the Court finds that defendants' contentions have merit. In an order dated February 5, 1987, the Eighth Circuit declined to reconsider its previous denial of plaintiffs' petition seeking additional costs. In that order, the Eighth Circuit stated "[i]t was the intent of this Court in our December 31, 1986 order to award the appellants $30,679 in attorneys' fees and $915.87 in costs for all services rendered with respect to all appeals to this Court. The Court now adheres to that ruling." The Eighth Circuit having awarded plaintiffs what it determined to be a fair amount for expenses incurred on appeal, it would be inappropriate for this Court to look beyond that award. Accordingly, plaintiffs are hereby awarded their district court level out-of-pocket expenses from defendants in the amount of $3,960.24.

3. Expert Witness Fees

By far the largest component of plaintiffs' statement of costs is the request for expert witness fees and expenses, which totals $93,946.69. Plaintiffs make this request pursuant to 28 U.S.C. §1920 and Rule 54 of the Federal Rules of Civil Procedure, as well as 42 U.S.C. §1988. Defendants contend that the request is grossly excessive and argue that plaintiffs should receive far less remuneration for these expenses.

Until recently, the Court would have been inclined to award plaintiffs the lion's share of the expert witness fees requested. However, this issue has been made more difficult by the United States Supreme Court's holding that ". . . absent explicit statutory or contractual authorization for the taxation of the expenses of a litigant's witness as costs, federal courts are bound by the [$30-per-day] limitations set out in 18 U.S.C. §1821 and §1920." [3] *Crawford Fitting Company v. J.T. Gibbons, Inc.*, ____ U.S. ____, 107 S.Ct. 2494, 96 L.Ed.2d 385 (June 15, 1987). Although the concurring and dissenting opinions in *Crawford Fitting* recite the understanding that the holding does not reach the question of whether a district court may award fees for an expert witness under 42 U.S.C. §1988, the majority declined the opportunity to so limit their decision.

Reimbursement of prevailing parties for the fees of expert witnesses has often been approved, in some cases under 28 U.S.C. §1920 and Federal Rule of Civil Procedure 54(d), *see e.g., Wilmington v. J.I. Case Co.*, 793 F.2d 909 (8th Cir. 1986); *Roberts v. S.S. Kyriakoula D. Lemos*, 651 F.2d 201 (3rd Cir. 1981), while in others pursuant to 42 U.S.C. §1988, *see e.g., Ramos v. Lamm*, 713 F.2d 546 (10th Cir. 1983); *Jones v. Diamond*, 636 F.2d 1364 (5th Cir. 1981) (overruled by *International Woodworkers of America v. Champion International Corporation*, 790 F.2d 1174 (5th Cir. 1986) (en banc), *aff'd.*, ____ U.S. ____, 107 S.Ct. 2494, 96 L.Ed.2d 385 (June 15, 1987). [4] Although not expressly disallowing the practice, some courts have ruled that it is not an abuse of discretion for a district court to decline to award compensation for expert witness fees to a prevailing party. *E.G., Davis v. Richmond, Fredericksburg & Potomac*

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As is apparent from the remainder of the opinion in *Crawford Fitting*, the citation in the quoted sentence to "18 U.S.C. §1821 and §1920" is merely a typographical error and should cite "28 U.S.C. §1821 and §1920."

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This case was consolidated on appeal by the United States Supreme Court with *Crawford Fitting*.

R. Co., 803 F.2d 1322 (4th Cir. 1986); *Walker v. Robbins Hose Co. No. 1, Inc.*, 622 F.2d 696 (3rd Cir. 1980).

The Eighth Circuit Court of Appeals has consistently approved awards for expert witness fees to prevailing parties. *E.g., Wilmington v. J.I. Case Co., supra; Nemmers v. City of Dubuque*, 764 F.2d 502 (8th Cir. 1985); *Paschall v. Kansas City Star Co.*, 695 F.2d 322 (8th Cir. 1982); *vacated on other grounds*, 727 F.2d 692 (8th Cir. 1984). In *Paschall*, the Eighth Circuit adopted the approach of the Third Circuit set out in *Roberts v. S.S. Kyriakoula D. Lemos, supra*, and followed the developing trend of allowing recovery of "expert witness fees when the expert's testimony was crucial to the resolution of the case." 695 F.2d at 338. In choosing that course, the Eighth Circuit cited *Farmer v. Arabian American Oil Co.*, 379 U.S. 227 (1965), noting that in that case "the Supreme Court indicated that Fed.R.Civ.P. 54 authorizes district judges to award costs not specifically enumerated in 28 U.S.C. §1821." *Id.*

In determining that expert witness fees were recoverable under 28 U.S.C. §§1821 and 1920 and Federal Rule of Civil Procedure 54(d), it appears that both the Eighth Circuit and the Third Circuit relied heavily on the statement in *Farmer v. Arabian American Oil Co.* that "[T]he discretion given district judges [by Rule 54(d)] to tax costs should be sparingly exercised with reference to expenses not specifically allowed by statute." 379 U.S. at 235. In *Crawford Fitting*, however, that statement and the notion that it authorizes an award of costs outside those specified in §1821 and §1920 were expressly disapproved.

In light of *Crawford Fitting*, this Court is convinced that it can tax as costs expert witness fees in excess of the $30-per-day limit of §1821 only where expressly authorized by statute or agreement. Congress has indeed shown a willingness to explicitly provide for their recovery, for "[a]t least twenty-eight statutes provide for the taxing of expert witness' fees as costs in civil actions, albeit under varying

standards . . . ." *International Woodworkers of America, supra*, 790 F.2d at 1179 n.7. As an example, section 307(f) of the Clean Air Act, 42 U.S.C. §7607(f) (1982), provides:

> In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate.

But, for whatever reason, Congress chose not to expressly provide in 42 U.S.C. §1988 for the recovery of expert witness fees in civil rights cases. As noted by Circuit Judge Godbold in his dissenting opinion in the civil rights case of *Jones v. Diamond, supra*, 636 F.2d at 1391:

> No Act of Congress is cited as authority for this proposition [that plaintiffs may recover expert witness fees]; indeed, there is none. Instead, the majority opinion relies on a Senate Report concerning legislation which could have contained such a provision, but *did* not.

There simply is no explicit statutory authority which would allow this Court to award plaintiffs expert witness fees in excess of $30 per day. Accordingly, plaintiffs shall be recompensed for their expert witness fees in the following amounts:

James L. Outtz	$ 330.00
E. Lee Hoffman	480.00
Rawleigh H. Rawls	90.00
Total	$ 900.00

The Court is not unmindful of the burden that this finding places on civil rights plaintiffs, not only in the instant case, but in others, as well. However, this Court is constrained to follow the pronouncements of the United

States Supreme Court. That constraint mandates the result reached herein.

In summary, the Court finds that plaintiffs shall receive from defendants total attorney's fees in the amount of $184,969.50, and total costs of $8,162.59. [5] Judgment shall be entered in accordance with this Opinion.

DATED this 4th day of August, 1987.

/s/ Elsijane T. Roy
United States District Judge

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5 The attorney's fees figure set out herein does not include sums paid by defendants to Messrs. John Walker and Emmanuel Pruitt pursuant to stipulation for attorney services on behalf of plaintiffs earlier in the case.

Supreme Court, U.S.
FILED
JUN 20 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1886

In The

Supreme Court of the United States

October Term, 1988

JOHNNIE GILBERT, *et al.*,

Petitioners,

vs.

CITY OF LITTLE ROCK, *et al.*,

Respondents.

On The Petition For Writ of Certiorari To The United States Court of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I

WHETHER, IN A CIVIL RIGHTS CASE WHEREIN A PREVAILING PLAINTIFF IS ENTITLED TO AN AWARD OF ATTORNEY'S FEES UNDER § 706 OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 OR THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976, ABSENT EXPLICIT STATUTORY OR CONTRACTUAL AUTHORIZATION FOR THE TAXATION OF A LITIGANT'S WITNESSES AS COSTS, FEDERAL COURTS ARE BOUND BY THE LIMITATIONS SET OUT IN 28 U.S.C. § 1821 AND § 1920.

II

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT CORRECTLY INTERPRETED THIS COURT'S MANDATE IN *CRAWFORD FITTING COMPANY V J.T. GIBBONS, INC.* AND WHETHER THE EIGHTH CIRCUIT'S DECISION IN THIS MATTER IS CONSISTENT WITH THE POST-*CRAWFORD* DECISIONS OF THE OTHER CIRCUIT COURTS OF APPEAL.

III

WHETHER CONGRESS'S USE OF THE PHRASE "REASONABLE ATTORNEY'S FEE AS PART OF THE COSTS" IN TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 AND THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976 CONSTITUTES EXPLICIT STATUTORY AUTHORITY FOR THE TAXATION OF EXPERT WITNESS FEES AGAINST A NON-PREVAILING DEFENDANT IN A CIVIL RIGHTS CASE.

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On The Petition For Writ of Certiorari To The United States Court of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, City of Little Rock, Arkansas, et al., respectfully request that this Court deny the Petition for Writ of Certiorari seeking to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The pertinent opinions below are included in the Appendix. The Memorandum Opinion of the District

Court limiting Petitioners to recovery of $30.00 per day of testimony for out-of-pocket expert witness fees is included in the Appendix, pages D-1 through D-12. *Gilbert v. City of Little Rock*, No. LR-C-78-340, slip op. (E.D. Ark. Aug. 7, 1987) (order), *citing*, *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 107 S.Ct. 2494, 96 L.Ed.2d 385 (1987). The decision of the United States Court of Appeals for the Eighth Circuit, sitting *en banc*, affirming the District Court, is also included in the appendix, pages A-1 and A-2. *Gilbert v. City of Little Rock*, 867 F.2d 1062 (8th Cir. 1989) (*en banc*). The panel decision of the United States Court of Appeals for the Eighth Circuit addressing the other issues on appeal is also included in the Appendix, pages B-1 through B-11. *Gilbert v. City of Little Rock*, 862 F.2d 1063 (8th Cir. 1989).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

REASONS FOR DENYING THE WRIT

The Petition for a Writ of Certiorari should be denied for the simple reason that the decision of the United States Court of Appeals is entirely consistent with the six-member majority's opinion in *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 107 S.Ct. 2494 (1987). There is no conflict among the circuits. Virtually all post-*Crawford* decisions of the circuit courts are consistent in applying the clear mandate of *Crawford*.

STATEMENT OF THE CASE

This case, first filed in 1978, has a long and tortured history, most of which is irrelevant for purposes of this appeal. On August 8, 1986 the United States Court of Appeals for the Eighth Circuit found that the oral interview component in the promotional process for the rank of sergeant at the Little Rock Police Department had a discriminatory impact upon black applicants for promotion in the years 1978 and 1979. *Gilbert v. City of Little Rock*, 799 F.2d 1210 (8th Cir. 1986). The Board of Directors of the City of Little Rock decided not to seek a Writ of Certiorari. Subsequently, upon issuance of the mandate from the Eighth Circuit, pursuant to the cost-shifting provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(K), and the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, petitioners sought slightly in excess of $350,000.00 in fees and costs, of which $93,940.69 was for expert witness fees. The District Court, citing *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 107 S.Ct. 2494, 96 L.Ed.2d 385 (1987), ruled that Petitioners' request for expert witness expenses was governed by the traditional cost-shifting provisions of Rule 54(d) of the Federal Rules of Civil Procedure and 28 U.S.C. § 1821 and § 1920 and, hence, that Petitioners were limited to recovery of the $30.00-per-day-of-testimony maximum contained in § 1821. *Gilbert v. City of Little Rock*, LR-C-78-340, slip op. (E.D. Ark. Aug. 7, 1987). Appendix at pages D-1 through D-12. The United States Court of Appeals for the Eighth Circuit, sitting *en banc*, affirmed by the vote of an equally divided Court. *Gilbert v. City of Little Rock*, 867 F.2d 1062 (8th Cir. 1989). Appendix at pages A-1 and A-2.

STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(K) provides in pertinent part:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs. . . .

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, provides in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the Court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs.

Rule 54(d) of the Federal Rules of Civil Procedure provides in pertinent part:

> Except when express provision therefore is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the Court otherwise directs;

28 U.S.C. § 1821(b) provides in pertinent part:

> A witness shall be paid an attendance fee of $30 per day for each day's attendance.

28 U.S.C. § 1920 provides in pertinent part:

> A judge or clerk of any Court of the United States may tax as costs the following: . . . (3) Fees and disbursements for printing and witnesses.

ARGUMENT

Petitioner's entire argument is premised upon two incorrect assumptions. First, they allege that denial of the Writ in this case will "result in the destruction of the law's intent under the Civil Rights Attorney's Fees Awards Act. . . ." Petition at page 5 (Hereafter "Pet. at ___"). Secondly, they say that there is "disagreement among the various circuits" as to the correct application of this Court's opinion in *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 107 S.Ct. 2494, 96 L.Ed.2d 385 (1987). *Id.* Both premises are incorrect. The truth of the matter is that the Eighth Circuit's holding in this case is compelled by the plain language of *Crawford*. *See*, Subsection I, below. *Crawford* is entirely consistent with the intent of Congress. *See*, Subsection III, below. And, with two minor exceptions at the district court level, all post-*Crawford* decisions have consistently and correctly followed this Court's direction. *See*, Subsection II, below.

I. IN A CIVIL RIGHTS CASE WHEREIN A PREVAILING PARTY IS ENTITLED TO AN AWARD OF ATTORNEY'S FEES UNDER § 706 OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 OR THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976, ABSENT EXPLICIT STATUTORY OR CONTRACTUAL AUTHORIZATION FOR THE TAXATION OF A LITIGANT'S WITNESSES AS COSTS, FEDERAL COURTS ARE BOUND BY THE LIMITATIONS SET OUT IN 28 U.S.C. § 1821 AND § 1920.

When reduced to its essence, Petitioner's basic argument is simple. They simply refuse to acknowledge that the plain language of the *Crawford* majority applies to a civil rights case. Instead, they focus upon the fact that

this Court has not specifically refused to allow taxation of expert witness fees as costs pursuant to the cost-shifting provisions of 42 U.S.C. §§ 1988 and 2000e-5(K). They say:

> Although the Supreme Court has construed 54 (d) as not granting the authority to go beyond the $30 a day limits of § 1920 and § 1821, the Attorney's Fees Award Act 42 USC (§ 1988) has not been so interpreted. Likewise, Title VII 42 USC § 2000e-5(K) has not been interpreted to place limits on expert witness expense.

Pet. at 5. This is incorrect. Several district and circuit courts have, applying the clear teaching of *Crawford*, refused to tax expert witness fees against non-prevailing civil rights defendants. Indeed, three of the five cases touted on Page 8 of the Petition as illustrative of the courts' post-*Crawford* treatment of this issue specifically refuse to tax expert witness fees under § 1988. *Boring v. Kozakiewicz*, 833 F.2d 468, 474 (3rd Cir. 1987), *citing Crawford*, "A prevailing party in a civil rights case is not entitled to tax such fees as costs."; *Sevigny v. Dicksey*, 846 F.2d 953, 959 (9th Cir. 1988) " . . . § 1988 does not provide statutory authority for the awarding of compensation for non-legal experts."; and, *ECOS, Inc. v. Brinegar*, 671 F. Supp. 381, 404 n.12 (M.D. N.C. 1987) "The most recent Supreme Court case on fees for experts supports the decision in the present case [i.e., not to allow taxation of such fees]. In *Crawford Fitting Co. v. J.T. Gibbons, Inc.* . . . the Court held that courts are bound by the limitations set out in 18 U.S.C. § 1821 and § 1920 ($30-per-day limit) when taxing expert witness fees as costs against a losing party. Although the opinion does not specifically address 42 U.S.C. § 1988, it is persuasive authority in this case."

In point of fact, *Crawford* is more than just "persuasive authority." The plain language of the six-member *Crawford* majority opinion compels the result reached by the trial judge and the Eighth Circuit in the case at bar. The *Crawford* ruling is capsuled in the following passage:

> We hold that absent explicit statutory or contractual authorization for the taxation of the expenses of a litigant's witnesses as costs, federal courts are bound by the limitations set out in 28 U.S.C. § 1821 and § 1920.

Crawford, supra, 482 U.S. at ___, 107 S.Ct. at 2499. The language employed by the *Crawford* majority is clear and unequivocal. Respondents take it to mean what it says. Absent "explicit statutory or contractual authorization" federal courts are not empowered to tax expert witness fees against a non-prevailing defendant in excess of those limitations imposed by 28 U.S.C. § 1821 and § 1920.

At this point it is probably as important to take note of what the *Crawford* majority did *not* do. The Court did not, for example, set aside civil rights cases for special treatment. The Court did not say – or even imply – that the words "costs" or "attorney's fees" are to assume anything other than their ordinary, plain meaning in the civil rights context. And, most importantly, the Court did not say – or even imply – that vague, indirect inferences gleaned from an act's legislative history will, in the civil rights context, substitute for explicit statutory authorization for the taxation of expert witness fees.

In this case Petitioners sought an award of fees and costs pursuant to the cost-shifting provisions of Title VII, 42 U.S.C. § 2000e-5(K), and the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988. (Hereafter

"§ 2000e-5(K)" and "§ 1988", respectively). The simple, yet inescapable, fact of the matter is that neither statute explicitly authorizes the taxation of expert witness fees. Using identical language, both say simply that "the court, in its discretion, may allow the prevailing party . . . a reasonable *attorney's* fee as part of the costs." *Id.* (emphasis added). That being the case, both the trial judge and the Eighth Circuit, having no explicit statutory authorization for the taxation of expert witness fees upon which to rely, in applying the plain holding of *Crawford* found themselves bound by the limitations contained in the traditional cost-shifting provisions of Rule 54(d), 28 U.S.C. § 1821 and § 1920. *Crawford* allows no other result. The Petition for a Writ of Certiorari should be denied for this reason alone.

II. THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT CORRECTLY INTERPRETED THIS COURT'S MANDATE IN *CRAWFORD FITTING CO. V. J.T. GIBBONS, INC.* AND IN SO DOING REMAINED CONSISTENT WITH THE POST-*CRAWFORD* DECISIONS OF THE OTHER CIRCUIT COURTS OF APPEAL.

As noted in Subsection I, above, the result reached by the district court and the Eighth Circuit in this matter was compelled by the simple fact that neither § 1988 nor § 2000e-5(k) explicitly authorizes the taxation of expert witness fees. Petitioners seek to avoid this obvious fact by pointing to Mr. Justice Blackmun's *Crawford* concurrence, arguing that this result is not compelled for the sole reason that § 1988 was "not at issue in *Crawford*." Pet. at 6, See, *Crawford, supra,* 482 U.S. at ___, 107 S.Ct. at 2499 (Blackmun, J., concurring); See also, *Id.*, 482 U.S. at ___, 107 S.Ct. at 2499-2502 (Marshall, J., dissenting) (joined by

Brennan, J.). Respondents offer two responses. First, the simple fact of the matter is that the *Crawford* majority opinion contains no such delimiting distinction. On its face, it provides not even a hint that § 1988 or § 2000e-5(K) in particular or civil rights cases in general remain unaffected by its seemingly all-encompassing rule. Second, it would appear that, in fact, § 1988 *was* at issue in *Crawford*. Certainly, the Fifth Circuit thought so. It said:

> The statutes applicable here, 42 U.S.C. § 1988 and § 2000e-5(K), provide for the award for attorneys' fees to prevailing parties, but make no mention of excess expert witness fees.

International Woodworkers of America v. Champion International Corporation, 790 F.2d 1174, 1181 (5th Cir. 1986). Even the oft-quoted *Woodworkers* concurrence/dissent recognized that § 1988 was at the root of the issue, noting that "in *Woodworkers*, a . . . prevailing party in an employment discrimination suit requests expert witness fees as a litigation expense incidental to an award of attorney's fees authorized by the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988." *Id.*, 790 F.2d at 1181 (Rubin, J., concurring in the result) (joined by Wisdom, Johnson and Williams, JJ).

In summary, the truth of the matter is that civil rights cases are not excluded, either explicitly or by implication, from the scope of the *Crawford* majority opinion. The rule of *Crawford* governs an application for expert witness fees as litigation expenses under § 1988 and § 2000e-5(K), just as it governs such applications in other cost-shifting contexts. And, because § 1988 and § 2000e-5(K) contain no explicit authorization for the taxation of expert witness

fees in excess of the limits imposed by 28 U.S.C. § 1821 and § 1920, the plain rule of *Crawford* compels the result reached by the trial judge and the Eighth Circuit in this case.

Failing in their effort to distinguish *Crawford*, Petitioners fall back upon the old conflict-among-the-circuits shibboleth, when, in fact, no such conflict exists. See, Pet. at 6-8. In support, they point to the *Woodworkers* dissent and *Dowdell v. City of Apopka*, 698 F.2d 1181 (11th Cir. 1983). They fail to note, however, that *Dowdell* and the cases cited in the *Woodworkers* dissent are all pre-*Crawford*. They do not and, with one non-notable exception, *see*, discussion below, cannot point to a single post-*Crawford* circuit court case wherein expert witness fees were taxed against a non-prevailing civil rights defendant pursuant to § 2000e-5(K) or § 1988. The truth is that the circuit courts of appeal have consistently interpreted *Crawford* to preclude taxation of expert witness fees absent explicit statutory or contractual authorization.

Leroy v. City of Houston, 831 F.2d 576 (5th Cir. 1987) and *Glenn v. General Motors Corp.*, 841 F.2d 1567 (11th Cir. 1988) are illustrative. In *Leroy*, Plaintiffs attacked the constitutionality of the City of Houston's at-large method of electing the Houston City Council. They won and, hence, were "prevailing parties" within the meaning of the cost-shifting provision of the Voting Rights Act, 42 U.S.C. § 1973*l*(e). The relevant provision of the Voting Rights Act is, in pertinent part, virtually identical to the cost-shifting provisions of 42 U.S.C. § 1988 and § 2000e-5(K). It says:

> In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendments, the Court, in its discretion, may allow the

> prevailing party . . . a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1973*l*(e) (Emphasis added). The Fifth Circuit, citing *Crawford*, refused to tax excess expert witness fees. It said:

> The second recent controlling development is the Court's determination that expert witness fees in excess of standard per diem and mileage costs may not be allowed as part of the costs to prevailing parties under federal fee-shifting statutes unless the statute explicitly so provides. *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, . . . Although that case expressly considered whether Fed.R.Civ. Proc. 54(d) could, in an antitrust case, override the statutory limit on witness fees, the Court's general reasoning leaves us no room to construe the Voting Rights Act provision here otherwise.

Id. 431 F.2d at 584. In *Glenn* the Eleventh Circuit (which, incidentally, is the same court which decided the *City of Apopka* case upon which Petitioners rely) did much the same thing. The Court was faced with a prevailing plaintiff's petition for taxation of expert witness fees under the cost-shifting provision of the Equal Pay Act, 29 U.S.C. § 216(b). In pertinent part, the Act says:

> The Court . . . shall, in addition to any judgment awarded to the plaintiff or plaintiff's, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

Id. While the cost-shifting provision of the Equal Pay Act varies slightly in language, it shares one important characteristic with the cost-shifting provisions of Title VII and the Civil Rights Attorney's Fees Awards Act. It too fails to explicitly provide for the taxation of expert witness fees.

The Eleventh Circuit found this omission to be fatal to Mr. Glenn's cause. It said:

> We hold that the broad language in *Crawford Fitting* does not permit a distinction based upon whether or not the award is made under a fee-shifting statute. The broad language in *Crawford Fitting* indicates that, although a statute may shift *attorney* fees, the statute does not operate to shift *witness* fees unless the statute refers explicitly to witness fees.

Glenn, supra, 841 F.2d at 1575 (Emphasis in original). Clearly, both the Fifth and Eleventh Circuits have correctly applied the plain meaning of this Court's *Crawford* holding.

The one non-notable exception to the otherwise-unanimous circuit court treatment of the plain rule of *Crawford* is *Sapanajin v. Gunter,* 857 F.2d 463 (8th Cir. 1988). Though wrongly decided, *Sapanajin* is of no import for the simple reason that it is pre-*Gilbert* and, hence, not the Eighth Circuit's latest statement on the issue. *Gilbert,* decided some four months after *Sapanajin,* is now the "law of the circuit."

Petitioners also cite two U.S. District Court cases in their attempt to generate a "split among the circuits." *Black Grievance Committee v. Philadelphia Electric Company,* 47 FEP Cases 215 (E. D. Pa. 1988) and *United States v. Yonkers Board of Education,* 118 F.R.D. 326 (S.D. N.Y. 1987). Neither is persuasive. To begin with, both are wrongly decided, emphasizing what the district judges *want* Title VII and § 1988 to say rather than the plain language of *Crawford* and the statutes. And one of them, *Black Grievance Committee,* is 180° opposite the law of its circuit. See, *Boring, supra.*

In summary, there is no conflict among the circuits justifying the granting of a Writ of Certiorari in this case. The circuits have consistently applied the plain meaning of *Crawford*.

III. CONGRESS'S USE OF THE PHRASE "REASONABLE ATTORNEY'S FEE AS PART OF THE COSTS" IN TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 AND THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976 DOES NOT CONSTITUTE EXPLICIT STATUTORY AUTHORITY FOR THE TAXATION OF EXPERT WITNESS FEES AGAINST A NON-PREVAILING DEFENDANT IN A CIVIL RIGHTS CASE.

Petitioners completely misconstrue one passage in Crawford. They say:

> The *Crawford* decision states "without plain evidence of Congressional intent" to supersede § 1821, 1920, and § 54(d), the court should not exceed the limitations therein. Therefore, the *Crawford* decision does not preclude awarding expert witness expense in a situation where Congress' intention to allow expert witness expense is clear.

Pet. at 6. It is true that the *Crawford* majority opinion says "[a]ny argument that a federal court is empowered to exceed the limitations explicitly set out in §§ 1920 and 1821 without plain evidence of congressional intent to supersede that section ignores our long-standing practice of construing statutes *in pari materia*." *Crawford, supra*, 482 U.S. at ___, 107 S.Ct. at 2499. Petitioners are correct in their assumption that the limitations contained in § 1821 and § 1920 will not control in the event Congress plainly demonstrates its intent to tax excess expert witness fees. What Petitioners fail to grasp, however, is the equally

obvious fact that the requisite "plain evidence" of congressional intent should be evident from the face of the statute – hence, the requirement of "explicit statutory authority." Indeed, a mere two sentences above the above-quoted passage the Court indicated that "[w]e will not lightly infer that Congress has repealed §§ 1920 and 1821 either through Rule 54(d) *or any other provision not referring explicitly to witness fees.*" *Id.* (Emphasis added).

Petitioners attempt to avoid the obvious ramifications of this fact by arguing that the legislative history of the Fees Act evidences the requisite congressional intent, this despite the fact that such intent did not manifest itself on the face of the statute. It is true that, from time to time, there does appear in the legislative history statements to the effect that, if private citizens are to enforce civil rights statutes, they must be able to recover what it costs them to vindicate these rights in court. Petitioners ignore, however, the fact that virtually all of these oblique references to "costs" or "expenses" occur within the context of a discussion of attorney's fees. The remarks of Representative Drinan referred to on Page No. 9 of the Petition are typical. The passage to which Petitioners refer reads in its entirety as follows:

> . . . [T]he bill permits the recovery only of a 'reasonable' *attorney fee.* Here too the courts have identified a number of factors to determine the reasonableness of awards. In Johnson versus Georgia Highway Express, for example, the court enumerated 12 factors to be considered, including the time and labor required, the novelty and difficulty of the questions, the skill needed to present the case, the customary fee for similar work, and the amount received in damages, if any. These evolving standards should

> provide sufficient guidance to the courts in construing this bill which uses the same term. I should add that the phrase 'attorney's fee' would include the values of the legal services provided by counsel, including all incidental and necessary expenses incurred in furnishing effective and competent representation.

122 Cong. Rec. 35123 (1976) (Emphasis added). Clearly, the thrust of Representative Drinan's remarks concerned attorney's fees. The $93,000.00 in expert witness fees at issue in this case are a far cry from "incidental and necessary expenses" incurred in the provision of *"legal services . . .* of counsel."

Petitioners also do not mention that, throughout the entire legislative history of § 1988, there is not one explicit reference to the taxation of expert witness fees. Not a single senator or representative is recorded as having said that the Act would have the practical effect of causing non-prevailing defendants to bear the costs of prevailing plaintiffs' out-of-pocket expert witness expenses. The simple truth of the matter is that, had Congress intended for § 1988 to result in the taxation of expert witness fees, someone would have said so during the long and exhaustive debate. None did, and that fact alone dooms Petitioners' argument that the legislative history provides the "plain evidence" of congressional intent sufficient to satisfy the rule of *Crawford*.

Lacking direct evidence, Petitioners attempt to create an inference of congressional intent. They cite the following passage from the official legislative history of the Act:

> It is intended that the amount of fees awarded . . . be governed by the same standards which prevail in

> other types of equally complex Federal litigation. . . . The appropriate standards, see *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974), are correctly applied in such cases as *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974); *Davis v. County of Los Angeles*, 8 E.P.D. § 9444 (C.D. Cal. 1974); and, *Swann v. Charlotte-Mecklenburg Board of Education*, 66 F.R.D. 483 (W.D.N.C. 1975). These cases have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys. In computing the fee, counsel for prevailing parties should be paid as is traditional with attorneys compensated by a fee-paying client, 'for all time reasonably expended on a matter'.

S. Rep. No. 1011, 94th Cong. 2nd Sess., reprinted in 1976 U.S. Code Cong. & Adm. News at p. 5913. See, Petition at 9-10. In essence, Petitioners would have this Court blithely assume that because a district judge in California allowed taxation of $1,500.00 in expert witness fees in *Davis, supra,* and because Congress mentioned *Davis* as illustrative of the treatment of attorney's fees, then, *ipso facto,* Congress *really intended* for § 1988 to provide for the taxation of expert witness fees, this despite the fact that nobody ever said as much. This is patently absurd. Oblique inferences do not constitute explicit statutory authorization.

The obvious fact of the matter is that if Congress had intended to tax expert witness fees it would have been obvious. It knows how to do so as evidenced by the fact that twenty-eight statutes expressly provide for the taxation of expert witness fees. *Woodworkers, supra,* 790 F.2d at 1179 n.7.

In summary, Congress's use of the phrase "reasonable attorney's fee as a part of the costs" cannot reasonably be construed to explicitly authorize taxation of expert witness fees. Such intent must be plainly evidenced on the face of the statute. The legislative history of § 1988 does not provide the requisite plain evidence of congressional intent to override the traditional cost-shifting provisions of § 1821 and § 1920.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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